In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-689

JASPER J. MIRABILE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the applicability of the federal mail fraud statute to his scheme to defraud the State of Missouri by submitting false sales tax returns by mail. He also alleges that the trial court erred in denying his motion to dismiss the indictment on the ground of impermissibly selective prosecution of him because of his Italian ancestry and his association with persons thought to be involved in criminal activity.

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on a one-count indictment charging mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a term of five years' probation. The court of appeals affirmed (Pet. App. A).

1. In 1969, petitioner employed Bill Henn, an accountant, to prepare monthly operating statements, payrolls, and state sales tax returns for a restaurant owned and operated by petitioner in Kansas City, Missouri (2 Tr. 3-5, 38, 137, 141).[1] Prior to the due date for the sales tax return, Henn reported the gross sales and state tax liability to petitioner. He also told petitioner that his review of prior sales tax returns showed that there had been a discrepancy in the reporting of the actual gross sales (2 Tr. 2, 8, 10). Petitioner specified to Henn an amount he intended to pay, which was less than 50 percent of the actual amount due (2 Tr. 11, 14-15). Henn then calculated a gross sales figure that would produce a tax liability in the amount petitioner had specified he was willing to pay (2 Tr. 13). Henn continued to prepare the sales tax returns in the same manner through November 1970 (2 Tr. 15).

Between late November 1970 and November 1971, petitioner employed James Martin to replace Henn (2 Tr. 40-47). During this period, petitioner asked Martin to give him a gross sales tax figure representing the amount petitioner was willing to pay—an amount considerably lower than the tax due on the actual gross sales (2 Tr. 43-45).

In November 1971, petitioner hired William Mangold to replace Martin (2 Tr. 70). Three or four months later, Mangold told petitioner of the discrepancy between the figures appearing on prior state tax returns and the prior actual gross sales figures (2 Tr. 72-73). From December 1971 or January 1972 through April 1972, petitioner gave Mangold the lower sales tax to be paid, on the basis of which Mangold computed the reported gross sales (2 Tr. 73-76).

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[1] "1 Tr." and "2 Tr." refer, respectively, to the transcripts of the proceedings on the motion to dismiss and of the trial.

2. In response to petitioner's motion to dismiss alleging improperly selective prosecution, the trial court invited the government to answer voluntarily seven of nine questions submitted by petitioner: (1) what the law enforcement considerations were for prosecuting petitioner; (2) whether anyone on the staff caused petitioner to be placed upon a list of organized crime subjects, and if so, (a) when this was done, (b) to whom was the information communicated and (c) which federal agencies supplied the Strike Force with information; (3) how the Strike Force became aware that petitioner was searched by border authorities in May 1972; (4) under what grant of authority the Strike Force operates in the Western District of Missouri; (5) whether authorization was given for any physical or electronic surveillance of petitioner after January 1, 1969; (6) when the Strike Force office first suspected petitioner of the tax violations; and (7) whether petitioner's counsel had been a subject of electronic or physical surveillance since January 1969 (1 Tr. 89-90, 96, 101, 103, 105). The court did not request answers to questions about the nature of specific evidence identifying petitioner as a person involved with organized crime and about the content of petitioner's statement to prosecutor De Feo when petitioner's wife appeared before the grand jury.

De Feo then testified that petitioner was prosecuted because of the quantum of proof available to establish the offense charged, the potential deterrent effect of the prosecution, and the probability of conviction (1 Tr. 122). He further testified that the federal agencies involved were the Federal Bureau of Investigation and the Internal Revenue Service; that petitioner had told De Feo that his wife should not have been subpoenaed to

appear before the grand jury; that the Strike Force derived its authority from 28 U.S.C. 515; that De Feo had no knowledge of electronic surveillance since January 1, 1969, of petitioner, his family or his attorney; and that petitioner was first suspected of underpaying his state tax in May 1973 (1 Tr. 122-124).

When asked on cross-examination whether he caused petitioner's name to be placed on an organized crime list, De Feo testified that petitioner was the subject of an anti-racketeering and gambling investigation in the early part of 1960 by the Federal Bureau of Investigation and had been investigated in mid-1960 by the Internal Revenue Service as an organized crime subject (1 Tr. 135-136). He further testified that as a result of a recompilation of a 1962 list of organized crime subjects prepared by the Attorney General, petitioner was designated as an organized crime subject. De Feo also testified that it was not until the end of 1972 that the Internal Revenue Service requested information about petitioner. Thereafter, in February 1973, the government directed a subpoena to the Missouri Department of Revenue to secure the tax returns of approximately 200 businesses believed to have "hoodlum" connections, including petitioner's restaurant. In May 1973 the Strike Force received information indicating that petitioner had underpaid his state taxes (1 Tr. 137). De Feo also testified that the assumption made by petitioner's counsel that only three Italians from a group of 2,000 possible violators of the state sales tax laws were prosecuted was erroneous and that petitioner was selected because he underreported $28,000—one of the largest amounts discovered by the Strike Force (1 Tr. 148-149). De Feo also denied petitioner's claim that he offered to drop the indictment in exchange for petitioner's cooperation (1 Tr. 149-150).

The court denied the motion to dismiss, stating that "the evidence in this case does not show that type or any type of illegal selective and discriminatory prosecution which would form the basis, or could form the basis, for a proper dismissal of the indictment" (1 Tr. 153).

3. Petitioner stipulated that of the restaurant's gross sales of $1,636,000, only $678,000 was reported; that of the tax liability of approximately $48,000, only about $20,000 was paid from January 1, 1970, through April 30, 1972; and that all of the tax returns and checks submitted to the Department of Revenue were signed by petitioner and mailed to the Department of Revenue (2 Tr. 38-39, 64-65, 113-114, 260-262).

4. Petitioner's contention that the mail fraud statute was improperly applied to his scheme to defaud the State of Missouri by submitting false tax returns by mail, because that scheme did not involve a federal injury and the mailing bore no relationship to the scheme, was properly rejected by the court of appeals. We rely upon the opinion of the court of appeals (Pet. App. 2a-6a) and upon our memorandum in opposition to the petition for a writ of certiorari to review the decision in *United States* v. *Flaxman*, 495 F. 2d 344 (C.A. 7), certiorari denied, No. 73-1894, November 25, 1974,[2] which presented the same question.[3]

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[2]We are sending petitioner's counsel a copy of our memorandum.

[3]Unlike the *amicus*, petitioner does not contend that he was obliged under state law to file the sales tax returns by mail. To the contrary, petitioner regards the mails as but one of the possible means of filing the returns, the selection of which should be inconsequential (Pet. 10). Accordingly, *amicus*' claim of a conflict with *Parr* v. *United States*, 363 U.S. 370, is unfounded.

The decision of the district court in *United States* v. *Henderson*, No. S-74 Cr. 866 (S.D. N.Y.), decided November 6, 1974, also relied on by *amicus*, is distinguishable because it involved the use of the mails in filing federal tax returns and required the court to construe the intent of Congress as reflected in two different acts of Congress. In any event, we contend that that case was wrongly decided.

5. In rejecting petitioner's claim of discriminatory prosecution, the courts below properly applied established principles. It is settled that a wrongdoer cannot escape prosecution and conviction simply because other offenders are not prosecuted. See, *e.g.*, *United States* v. *Malinowski*, 472 F. 2d 850, 860 (C.A. 3), certiorari denied, 411 U.S. 970; *Washington* v. *United States*, 401 F. 2d 915, 925 (C.A.D.C.); *Moss* v. *Hornig*, 314 F. 2d 89, 92-93 (C.A. 2). As this Court stated in *Oyler* v. *Boles*, 368 U.S. 448, 456, "selective enforcement" is not itself forbidden; rather, the exercise of prosecutorial discretion is subject to challenge only upon proof that selection of a particular defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[4]

Even if petitioner's allegations could be regarded as a sufficient showing of improper motivation to justify dismissal, that claim was properly rejected here. After hearing the prosecutor's testimony, which showed, among other things, that petitioner's fraudulent underpayments were among the target uncovered by the investigation, the district court concluded that petitioner was not selected for prosecution for the reasons alleged by

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[4]Some courts have recognized this defense where a defendant has shown that he was singled out for prosecution because of his exercise of rights protected by the First Amendment. See *United States* v. *Falk*, 479 F. 2d 616 (C.A. 7) (*en banc*); *United States* v. *Steele*, 461 F. 2d 1148, 1150-1152 (C.A. 9). No such factor is present here.

petitioner. That essentially factual determination was sustained by the court of appeals, and further review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.